VAAS
v.
RODRIGO

COURT OF APPEAL,
WIJETUNGA, J.,
C.A. No. 977/82 (F) – D.C. COLOMBO No. 3947/RE.,
MAY 15, 1990.

Landlord and tenant – Defendant contesting validity of notice to quit – Burden of raising issue on validity of notice to quit – waiver – Date of Commencement of tenancy – Reasonable requirement.

(1) What the Law requires is that a notice of termination of a monthly tenancy must run concurrently with the term of the letting and hiring, in the absence of an agreement to the contrary. If therefore the Defendant was challenging the validity of the Notice to quit on this

basis, it was incumbent on him to have raised an issue on this matter, as otherwise the plaintiff would be denied the opportunity of placing the necessary evidence, if any, before the Court in regard to the term of letting and hiring. The defendant's failure to put the validity of the notice in issue is tantamount to a waiver.

(2) There must exist at the relevant date a present requirement to use the premises for the purpose of a business which has already been established or, in the alternative, which will be established by him as soon as the premises are made available to him. The element of immediate requirement can be established with reference to an event which would take place on a specified date in the near future.

Cases referred to :

(1) *Chettinad Corporation Ltd., v. Zaneek* 55 NLR 152

(2) *Warwick Major v. Fernando* 4 CWR 221, 222

(3) *Andree v. de Fonseka* 51 NLR 213, 215, 216

(4) *Hameedu Lebbe v. Adam Saibo* 50 NLR 181

(5) *Appuhamy v. De Silva* 67 NLR 188

APPEAL from judgment of the District Court of Colombo.

P. A. D. Samarasekera, P.C. with *Shantha Perera* for the defendant - appellant

H. L. de Silva, P.C. with *S. Parathalingam, P. N. Ratnawardena* and *Janake de Silva* for plaintiff - respondent

Cur. adv. vult.

September 21, 1990

WIJETUNGA, J.

The plainfiff sued the defendent *inter alia* in ejectment from the premises in suit and for recovery of arrears of rent and damages. It was averred that the said premises are reasonably required by the plaintiff and the members of his family, within the meaning of Section 22(1)(*b*) of the Rent Act, No. 7 of 1972 and also that the defendant is in arrears of rent for more than three months after the rent fell due, in respect of the period 1.12.75 to 31.1.80. The rent was payable at the end of each and every month.

On or about 27.12.78, the plaintiff, by his Attorney-at-Law, gave the defendant notice to quit the said premises at the end of 31.12.79, in accordance with the provisions of Section 22(6) of the Rent Act.

The defendant, in his answer, stated *inter alia* that he had taken the said premises from the plaintiff on a monthly rental of Rs. 200, but denied having taken or received the furniture and fittings referred to in the second schedule to the plaint. He admitted the receipt of the notice to quit, but claimed that it was not valid in law. He further made a claim in reconvention in a sum of Rs. 11,345.

At the commencement of the trial, the following admissions were recorded that –

(1) the defendant received the notice dated 27.12.78 ;

(2) the standard rent of the premises is less than Rs. 100 per month ;

(3) the tenancy agreement between the plaintiff and the defendant commenced after 12.3.72 ; and

(4) a rental of Rs. 200 per month had been paid in respect of the premises.

The case went to trial on a number of issues and the learned District Judge entered judgement for the plaintiff in ejectment and for the recovery of arrears of rent and damages as specified in the judgement. He further held that the defendant was entitled to the refund of a sum of Rs. 5,000, being a deposit made with the plaintiff in respect of the furniture. It is from this judgment and decree that the defendant has appealed to this Court.

At the hearing of this appeal, learned President's Counsel for the defendant-appellant submitted that there was no proof of lawful termination of the tenancy, as the plaintiff had not raised an issue on the validity of the notice to quit. Learned President's Counsel for the plaintiff-respondent, however, contended that the tenant must put the validity of the notice in issue and if no issue is raised, that would be tantamount to a waiver. It must be noted that though the defendant, in his answer, made an averment that the said notice was not valid in law, he did not specify the grounds on which he claimed the notice to be invalid ; nor did he raise any issue in regard to the validity of the notice.

The case of *Chettinad Corporation Ltd., v. Zaneek* (1) relied on by the appellant, is no doubt authority for the proposition that the landlord should establish the termination of the contract, either by due notice or by effluxion of time, before claiming a decree for ejectment. But, I do not

understand this decision as casting a further obligation on the plaintiff, in every such case, to raise an issue on the validity of the notice to quit.

In the instant case, the notice, the receipt of which has been admitted and which has been produced marked P 6, conforms on the face of it to the requirements of Section 22(6) of the Rent Act, in that, the landlord of the premises has given the tenant one year's notice in writing of the termination of the tenancy, on the ground that such premises are required for occupation as a residence for himself and the members of his family. It is averred in the plaint that the rent was payable at the end of each and every month, implying thereby that the tenancy had commenced on the first day of a month. The defendant does not state in his answer that the tenancy commenced on a date other than the first day of a month. Nor has he raised an issue on this matter. Admission No. 3 recorded at the trial merely states that the tenancy agreement between the plaintiff and the defendant commenced after 12.3.72. But, this is not an admission that the monthly tenancy commenced on a date other than the first day of a month.

As was stated in *Warwick Major v. Fernando,(2)* the plaintiff might be able to show by evidence that although the premises were let to the defendant on a date other than the first day of a month, the agreement was that the monthly tenancy should be from the beginning of every month. As this matter was not raised at the trial by way of an issue, the Court could not have considered the question of the validity of the said notice on the basis that it was not concurrent with the term of the tenancy. What the law requires is that a notice of termination of a monthly tenancy must run concurrently with the term of the letting and hiring, in the absence of an agreement to the contrary. If, therefore, the defendant was challenging the validity of the notice to quit on this basis, it was incumbent on him to have raised an issue on this matter, as otherwise the plaintiff would be denied the opportunity of placing the necessary evidence, if any, before the Court in regard to the term of the letting and hiring. The defendant having failed to do so at the trial cannot now be heard to complain about the validity of the said notice. I am, therefore, of the view that the defendant's failure to put the validity of the notice in issue is tantamount to a waiver.

The other matter urged by the appellant is on the question of reasonable requirement. It was submitted that the plaintiff's requirement should be immediate and must be shown to exist as at the date of institution of the action.

Gratiae, J., in *Andree v. de Fonseka,(3)* dealing with the provisions of Section 8(c) of the Rent Restriction Ordinance, No. 60 of 1942, held that it is in certain circumstances open to a landlord, in terms of that section, to claim back his premises for the purpose of establishing a business which has not yet come into existence. He followed the decision of Nagalingam, J., in *Hameedu Lebbe v. Adam Saibo,(4)* and went on to state at pages 215 and 216 that "there must exist at the relevant date a **present requirement** to use the premises for the purposes of a business which has already been established or, in the alternative, which will be established by him as soon as the premises are made available to him." On the same analogy, what the plaintiff in the instant case sought to establish was his **present requirement** to use the premises as a residence for himself and the members of his family, with reference to an event which was to take place on a specified date in the near future. The plaintiff was employed in Oman on a contract which was to expire on 31.12.82. The learned trial judge was satisfied that he would, in any event, reasonably require these premises for his own occupation, on his return to the Island thereafter. Even otherwise, the plainfiff's wife and children, who were resident in Colombo, were occupying comparatively much smaller premises, paying a monthly rental of Rs. 1,000 and they required the premises in suit for their immediate occupation. On the balance of convenience as between the parties, the learned trial judge has unhesitatingly come to the conclusion that the plaintiff should suceed.

Appuhamy v. de Silva, (5) is authority for the proposition that the element of **immediate requirement** can be established with reference to an event which would take place on a specified date in the near future. In that case, the plaintiff who was a Government servant who was due to retire at an early date, sued the defendant for ejectment on the ground that the rented premises were reasonably required for his occupation as a residence. It was held that although the plaintiff was in occupation of Government quarters at the time of the institution of the action, it could not be contended that his requirement of the rented premises was not immediate at the time of the action.

In my view, therefore, the defendant cannot succeed on this ground too.

For the reasons aforesaid, I would dismiss this appeal with costs.

Appeal dismissed.